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Argued by
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Supreme Court of the United States

October Term 1945

No. 769

QUEENSIDE HILLS REALTY CO., INC.,
Appellant,

against

T. NEWTON SAXL, as Commissioner of Housing and Buildings of the City of New York,
Appellee.

ON APPEAL AS OF RIGHT FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK PURSUANT TO §267A OF THE JUDICIAL CODE.

BRIEF FOR THE APPELLEE

March 23, 1946.

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 769

QUEENSIDE HILLS REALTY CO., INC.,

Appellant,

against

T. NEWTON SAXL, as Commissioner of Housing and Buildings of the City of New York,

Appellee.

APPELLEE'S BRIEF

Preliminary Statement

The appellee, presents this Brief on his behalf in the appeal by Queenside Hills Realty Co. Inc., the plaintiff-appellant below, from a unanimous judgment of affirmance by the Court of Appeals of the State of New York (R. 24-25), which affirmed the order of the New York Supreme Court, Appellate Division, First Department (omitted in printing), unanimously affirming the resettled order of the New York Supreme Court, Special Term, New York County (R. 3), and the judgment entered thereon in the office of the Clerk of that County (R. 2), where the motion of William Wilson, the then Commissioner of Housing and Buildings of the City of New York, the original defendant-

appellee, after answer, for judgment on the pleadings and dismissal of the complaint, was granted.

The Court of Appeals denied plaintiff-appellant's motion for reargument, but recalled its remittitur and amended it to show that "A question under the Constitution of the United States was presented and necessarily passed upon" by the Court. The question presented is the constitutionality, under Section 1 of the Fourteenth Amendment of the Constitution of the United States, of Section 13 of the Multiple Dwelling Law of New York, as amended by Laws of New York of 1944, Chapter 553, in requiring all existing lodging houses within the City of New York to be equipped or constructed with certain safeguards, of which the principal item complained against is the installation of an automatic wet pipe sprinkler system.

Opinions Below

No opinions were rendered in any of the three courts below* (R. 24, 25). The decision of Mr. Justice CARROLL G. WALTER sitting in the New York Supreme Court, Special Term, Part 3, New York County, before resettlement of his order (R. 3-4), is unofficially reported in the *New York Law Journal* of October 27, 1945; the unanimous order of affirmance by the New York Supreme Court, Appellate Division, First Department, is reported in 269 App. Div. 691; the unanimous affirmance by the Court of Appeals of the State of New York is reported in 294 N. Y. 917; the denial of the motion for reargument and the requested

* What is entitled the opinion of the Special Term (R. 22) is a memorandum of decision only.

return of the remittitur for amendment to show that a question arose under section 1 of the Fourteenth Amendment of the Constitution of the United States is reported in 295 N. Y. 567; the order of Chief Judge LOUGHRAN of the Court of Appeals allowing this appeal is at pages 27-28 of this transcript of record.

Jurisdiction

Jurisdiction is invoked under 237, paragraph a of the Judicial Code (344, Title 28, U. S. Code)*. (R. 26-30). An order noting probable jurisdiction was made by this Court on February 11, 1946 (R. 34). Since the case arose, William Wilson, the original defendant herein, resigned as Commissioner of Housing and Buildings of the City of New York, and this Court by its order has substituted T. Newton Saxl, his successor, duly qualified and acting as such, as appellee.

Statement of the Case

The Pleadings

Appellant, as plaintiff, sought by its complaint under its first cause of action a declaratory judgment in equity declaring the law regulating lodging houses in the City of New York unconstitutional, as denying the plaintiff and all persons similarly situated due process, and as confiscatory and discriminatory under the State and Federal

* Our first law point in this brief argues against the fullness of jurisdiction appellant assumes to find thereunder in this Court. The Assignments of Error (R. 30) in items 8, 9 and 10 are broader than the Remittitur, as amended by the Court of Appeals, allows (R. 26).

Constitutions (R. 9). In its second cause of action appellant raised a question of statutory construction, alleging that the statute assailed does not apply to its building, but only to lodging houses erected prior to the enactment of the Multiple Dwelling Law of New York on April 18, 1929 (Laws of 1929, Chapter 713; Chapter 61A of the Consolidated Laws). The statute assailed amended subdivisions 1, 2, 3, 4, 5, 6, and 7 of Section 13* of the Multiple Dwelling Law by Laws of 1944, Chapter 553, effective April 5, 1944. Appellant's prayer for relief asked for a declaratory judgment declaring null and void and of no effect the statute assailed as applied to appellant's building and all buildings similarly situated; for injunctive relief against the defendant-appellee; for mandatory relief directing the defendant-appellee to remove of record the violation posted against the plaintiff-appellant, or any similar violations posted against premises similarly situated; and for other and further and different relief (R. 9-10).

Declaratory judgments are provided for under §473 of the Civil Practice Act of New York and Rules 210-214 of the Rules of Civil Practice.

Appellant annexed to its complaint as an exhibit a copy of defendant-appellee's Notice of Violation and the defendant-appellee's Instructions issued in such cases (R. 10-13).

Appellee answered by denying in generality or specifically all plaintiff-appellant's substantial contentions, setting up affirmatively (R. 15-16) legislative findings made at the time of the original enactment of the Multiple Dwell-

* In the order of the Court of Appeals allowing this appeal (R. 27-28) this is referred to as "Section 4 of Chapter 533 of the Laws of 1944." This "Section 4" is the Session Law number.

ing Law in 1929, and alleging that plaintiff's premises at 312-314 Bowery, in the Borough of Manhattan, consist of a non-fireproof lodging house which is a Class B multiple dwelling; that plaintiff-appellant's premises are unsafe, and further alleging the statute assailed is within the police power (R. 16-17). Annexed as an exhibit is a copy of a report of the Temporary Commission to Examine and Revise the Tenement House Law dated January 24, 1929 (R. 18-21). Defendant's Exhibit B, annexed to its answer, is the same as appellant's exhibit annexed to its complaint.

We refer to defendant-appellee's denials and new matter alleged in his answer and exhibit, not because under demurrer *practice*, common everywhere, the allegations of the complaint in the *practice* on the motion were not taken as true; but because on the *substantive* question of constitutional law the Court's could scan the verified answer (R. 17), and exhibit for information as to what is the factual situation *generally* affected by the legislation. A verified suggestion by a public officer stating a jurisdictional fact has been accepted by this Court before in *Ex Parte State of New York, No. 2* (1920), 256 U. S. 503, 509-10. Under Rule 112 of Rules of Civil Practice, the Courts below could scrutinize either pleading.

The facts argued below and asked to be judicially noticed really constitute the factual body of this case. These facts, which were mostly presented upon the pleadings, exhibits and briefs of counsel, are as follows:

1. The Message of the Governor.

Governor Dewey in signing the bill, enacted as the statute here assailed, filed the following memorandum:*

---

* This was called to the attention of the courts below.

"STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY

April 6, 1944.

MEMORANDUM filed with Senate Bill,
Introductory Number 1218,
Printed Number 1840, entitled:
'AN ACT to amend the multiple dwelling
law, in relation to fire protection
in existing lodging houses.'

APPROVED: —

This bill imposes certain standards of safety for a type of lodging house that is characterized as a 'flop house.' These so far have been unregulated. This type of building was involved in the tragic and disastrous loss of life as the result of a fire in New York City in December 1943. It seems unbelievable that first we ignore the conditions under which some people live and then when we ascertain the great hazards of those conditions we, by regulations, further validate the existence of those conditions. To leave them unregulated would, however, be the worse evil. Much more remains to be done.

The bill is approved.

(Signed) THOMAS E. DEWEY"

2. *The Inception of the Legislation.*

Appellant said in its brief below (p. 3, par. 7): "About Christmas, 1943, there was a disastrous fire in an old lodging house in West 42nd Street, New York City. As a result of agitation following this fire, the Legislature adopted" the statute assailed. It is also a notorious fact that 19 lodgers died in that fire.

Plaintiff-appellant further alleged in his complaint (R. 17):

"17. That at no time has any fire occurred in any lodging house built since the year 1929 in which there has been any loss of life and that the safeguards imposed by the Multiple Dwelling Law as it existed on April 4, 1944, and other laws and regulations applicable thereto, are in all respects adequate and sufficient to prevent a loss of life."

Defendant in its answer, paragraph Sixth, denied information sufficient to form a belief as to whether any fire occurred in any lodging house built since 1929 in which there was any loss of life (p. 15).

The bill enacted as Chapter 553, of the Laws of 1944, was not the City's bill, but was proposed by "The Association of Lodging House Keepers of New York, Inc." and other persons in conjunction with Mr. George H. Hallett, secretary of the Citizens' Union, who sought to protect the public interest. The City's bill was that introduced by Assemblyman Mitchell, being Assembly Pr. No. 434; Introductory No. 427. It did not move after reference to committee. The bill passed was introduced as Senate Print Nos. 1377, 1840; Senate Introductory No. 1218, by Senator Desmond, passed in Senate March 13, 1944, passed in Assembly March 18, 1944, approved by the Governor and effective on April 5, 1944. There were two other bills on the subject also introduced, which did not move after reference (Senate Pr. 995; Int. No. 303; Assembly Pr. 26; Int. No. 26).

3. The Reason Why the Statute Assailed Was Made Applicable to Existing Lodging Houses Only.

It was argued by defendant-appellee below that due to the scarcity of materials and because of priorities, no new lodging houses had been built in New York City since the War began, and that there did not exist during the course

of the litigation in the State Courts after April 5, 1944 (the date of enactment of the statute assailed), as there does not now exist, any new lodging houses. The plaintiff-appellant, so far as we can find, nowhere denied those statements of fact in the briefs of appellee below.

4. The Mitchell Committee.

Contemporaneously with the enactment of the statute assailed there was appointed a Joint Legislative Committee to Recodify the Multiple Dwelling Law, which has filed two reports, is still investigating, and has, at the current session, introduced legislation to cover new construction of lodging houses. This committee was created by a Joint Resolution adopted by the Assembly, March 15, 1944, and by the Senate, March 17, 1944, providing for a Joint Committee: "to investigate and make a detailed study of the provisions of the Multiple Dwelling Law of the State of New York; to examine into the regulatory language contained in such law for the purpose of revising and amending the same, as well as bringing up to date its provisions in accordance with modern principles of building construction and in the light of affording maximum tenant protection," etc. Assemblyman MacNeil Mitchell is Chairman of that Committee. Its reports are legislative documents (1945) No. 46, and (1946) No. 4. These were not brought physically to the attention of the courts below, but we beg leave to hand up copies thereof to this Honorable Court under its own rules of judicial notice. Their significance lies in the fact that at page 8 of No. 46 there is a tabulation of Class A and Class B multiple dwellings in New York City. Under "B", the lodging houses existing are found only in the Borough of Manhattan, where there are 123,

and in the Borough of Brooklyn, where there are 22, making a total of 145, accommodating approximately 15,000 persons. This is the only reference to lodging houses in either report, but the reports do indicate that the Committee has continued to function in studying the subject of multiple dwellings generally.

There have been introduced in the Legislature Assemblyman Mitchell's bill amending Section 13 of the Multiple Dwelling Law, and Senator Coudert's bill amending the same section (Assembly Int. No. 2620, Pr. Nos. 2936, 3240; Senate Int. No. 2291, Pr. Nos. 2580, 2823). We have also been shown a draft of further amendments to Section 13 dealing with new construction, prepared upon behalf of the Mitchell Committee. What the course of this legislation will be we ourselves, cannot predict. Whether the pending bills will fail in either House, or whether one or the other will pass, or whether either or both will receive executive approval or disapproval is beyond our gift of prophecy. We cite the legislation to show that the problem appellant seeks to solve as a constitutional difficulty is a statutory one in the hands of the Legislature, where it properly belongs; and it should be left with that body for solution under the tradition of the Great Dissent in *Lochner* v. *New York* (198 U. S. 74-76), and all that has followed after. Because the Legislature still is struggling with the future, shall it now be said the law-makers have not dealt fairly with the present and the past?

5. *Provisions of Statute Involved.*

The Statute is printed as Appendix A in this brief.

Summary of Argument

We shall develop the argument under the following points:

I. This appeal brings here under Section 237a of the Judicial Code only a Constitutional question. The propriety of the practice and procedure as exercised by and before the New York courts in granting judgment on the pleadings to the appellee and in dismissing the complaint is not before the Court.

II. The complaint was fatally defective below because of the omission of any allegation that there now exists or is about to be constructed a single lodging house of the same classification as appellant's in favor of which the statute complained of discriminates against the appellant.

III. The claim of unequal protection of the laws is unjustified, because the legislature recognized that there had been no new lodging houses built since the war and is even now considering legislation for new construction of such buildings.

IV. The claim of costliness is without merit.

POINT I

This appeal brings here under §237a of the Judicial Code only a constitutional question. The propriety of the practice and procedure as exercised by and before the New York Courts in granting judgment on the pleadings to the appellee and in dismissing the complaint is not before the Court.

The complaint, so far as any violation of the first section of the Fourteenth Amendment is concerned, attacks only

the *statute* under which the defendant is acting. There is no question properly brought here that the New York *Courts* have by *the form of their decisions* in dismissing the complaint, denied appellant due process or equal protection, or that they have confiscated appellant's property. The vice, if any, is in the act of the Legislature in amending the Multiple Dwelling Law; not in enacting the Civil Practice Act; nor is the vice in the rules of Civil Practice Act made by our courts; nor in the practice of our courts in granting defendant-appellee judgment on the pleadings and by dismissing plaintiff-appellant's complaint. (See Appellant's Assignments of Error, items 8, 9 and 10 in this Record at pp. 31-32.)

The case comes here under paragraph a of §237 of the Judicial Code dealing with a suit in the highest court of a State where is drawn in question the validity of a state statute as repugnant to the Federal Constitution, and the decision is in favor of the statute's validity. This is the way jurisdiction is stated at page 2 of Appellant's brief. The case is not here pursuant to the Court's discretionary power to review by certiorari, as provided in paragraph b of §237 of the Judicial Code.* We refer to note 4 in the

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* Judicial Code, 43 Stat. 937 (ch. 229, 1925), §237:

"b. It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question * * *; *or where any title, right, privilege or immunity is specially set up or claimed under the Constitution* * * *; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. * * *" (Italics ours.) (See 45 Stat. 54, Act of January 31, 1928, substituting appeal for writ of error.)

opinion of the Court by Mr. Chief Justice STONE in *Ex Parte Peru* (1943), 318 U. S. 578, at pages 585-586 that this Act is designed "to curtail the court's obligatory jurisdiction".

We take it that this Court will not assume the administration of justice in the State civil courts, as involving a constitutional question, wherever seasonable objections and exceptions are made on the dismissal of a complaint, a verdict directed, a verdict set aside, where a triable issue is not found, or a case is decided upon the papers, as in the case at bar; all in accordance with whatever may be the local practice. *Lee* v. *Central Ga. Ry. Co.* (1920), 258 U. S. 109, 110. This Court has refused to find the Constitution involved, even where the courts of different States render contrary decisions on a domicil in conflicting claims for taxes, *Hill* v. *Martin* (1935), 296 U. S. 393; *Worcester County Co.* v. *Riley* (1937), 302 U. S. 292, 299, except under the extraordinary circumstances disclosed in *Texas* v. *Florida* (1939), 306 U. S. 398. Yet appellant here, argues in effect, that neither our intermediate appellate court nor our court of last resort in practice cases, correctly understood or administered §476 of our *Civil Practice Act* or Rule 112 of our Rules of Civil Practice dealing with judgment on the pleadings. Such matters are not within the revisionary powers of this Court as historically understood and exercised.*

Where this Court has reversed and remanded the decisions of state courts in civil cases, because of the denial in the courts themselves of due process or other constitutional safeguards addressed to the states, it has, since

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* *The Origin and Scope of the American Doctrine of Constitutional Law*, by the late James B. Thayer; 7 Harvard Law Review, 129-156.

the Act of 1925, so far as we can find, done so under the discretionary power conferred by paragraph b of §267 of the Judicial Code, and not under its "obligatory jurisdiction", pursuant to paragraph a. *Hansberry* v. *Lee* (1940), 311 U. S. 32. See also *Postal Telegraph Cable Co.* v. *Newport* (1918) 277 U. S. 465, decided seven years before the amendment explained by Mr. Chief Justice STONE in his note to *Ex Parte Peru*, *supra*. The *Postal* case came up on a writ of error. The statute then permitted writ of error where was questioned, "an authority exercised under any State", as well as State statutes (Act of Sept. 6, 1916, 39 Stat. 726). The Circuit Court of Appeals for the Fifth Circuit (1940) in the related cases of *Williams et al.* v. *Tooke* and *Hendron et al.* v. *Yount-Lee Oil Co. et al.*, 108 F. 2d 758, 759, expressed the opinion that in such civil cases resort must be made directly here. Subsequently, in *Williams et al.* v. *Tooke et al.*, application for certiorari was denied (1940-1941), 311 U. S. 655. See also the dissent at page 356 in *Riley* v. *New York Trust Co.* (1942), 315 U. S. 348. Yet, in all those cases the denial of due process had to be substantial. *Dennick* v. *Miami Savings & Loan Co.* (1944-1945), 323 U. S. 667, 813, where, in a *per curiam* opinion, an *appeal* was dismissed "for want of a substantial federal question." No opinion was expressed as to whether or not this Court might have entertained an application for certiorari, if the question had been substantial.

Appellant, in the case at bar, never complained about the action of Mr. Justice WALTER at Special Term in not sending the case to trial as a denial of equal protection or due process of law; in its brief in the Court of Appeals, appellant complained of it as judicial error, much as he does here. We submit this does not raise a federal constitutional question in relation to the acts and decisions of

our Courts by themselves. Only the statute complained of is here.

In a series of life and death cases it was argued successfully here:

> "The Fourteenth Amendment is a prohibition against the States. It matters not, therefore, how the State works the exclusion, 'whether through its legislature, *through its courts*, or through its executive or administrative officers'." (Emphasis supplied). (Petitioners' Brief, p. 60, in *Powell* v. *Alabama* (1932), 287 U. S. 45, citing *Carter* v. *Texas* (1900), 177 U. S. 442.)

There, however this Court exercised its discretion and brought up the cases by certiorari pursuant to paragraph b of §237 of the Judicial Code.

Of course, in a criminal case a complainant has the additional advantage of the summary writ of habeas corpus; but the application should first be made in Federal District Court, *Ex Parte Hawk* (1944), 321 U. S. 114 (317 U. S. 397); or the denial of habeas corpus in the state court may be reviewed here on certiorari, *Hawk* v. *Olson* (—U. S.—Nov. 13, 1945). In *Palko* v. *Connecticut* (1937), 302 U. S. 319, the case came here by appeal; but there it was the statute permitting the prosecution to appeal in a criminal case that was unsuccessfully attacked as imposing double jeopardy; not any violence in the Connecticut courts themselves was charged by the appellant there. Certiorari seems to be the accepted form of reviewing claims of denial of due process by state criminal courts: cases related to the *Powell* case, *Norris* v. *Alabama* (1935), 294 U. S. 580; *Patterson* v. *Alabama* (1935), 294 U. S. 600; or like *Snyder* v. *Massachusetts* (1934), 291 U. S. 97; *Brown* v. *Mississippi* (1936), 297 U. S. 278; *Avery* v. *Alabama* (1940), 308 U. S.

45; *Betts* v. *Brady* (1942), 316 U. S. 455; *Williams* v. *Kaiser* (1945), 323 U. S. 471; *House* v. *Mayo* (1945), 324 U. S. 212; *White* v. *Rogers* (1945), 324 U. S. 760 (where certiorari went to review denial of habeas corpus in the State court of last resort). However, in *Buchalter* v. *New York* (1943), 319 U. S. 427, when this Court brought up by certiorari the affirmance of a death sentence by our New York State Court of Appeals, this Court refused to speculate on denial of due process in the trial court, as the appellant in the case at bar now asks this Court to do. Certainly the supreme rights of life or liberty tested in a criminal case are not to be compared to the denial of a judgment to the litigant here, with so many other remedies open to it to test a somewhat unsubstantial constitutional question.

Surely not every *defeated* litigant is denied due process or equal protection of the laws in the Courts. Where this Court reverses a state court on a constitutional question, the court below may be chargeable only with error, while at the same time having been most meticulous in extending due process and administering equal protection so that neither plaintiff nor defendant may complain upon these grounds.

We await the production of a case where this Court has said that the mere management by a State court of procedural forms in a civil suit has amounted to a denial of due process or equal protection. We admit the possibility of the abuse of civil processes, as shown under the *Hansberry* case and others, *supra*, but we cannot find abuse present in the action of the courts whose judgments are now brought here for review. Surely, the denial of a declaratory judgment is highly discretionary under our local law as interpreted by the Court of Appeals and under Rules 211 and 212 of the Rules of Civil Practice, *Bareham* v. *City of Rochester* (1927), 246 N. Y. 140, 143;

although the discretion must be exercised judicially and not arbitrarily, *James* v. *Alderton Dock Yards* (1931), 256 N. Y. 298, 305. Nevertheless, the judicial discretion in granting the remedy may be abused, *Woollard* v. *Schaffer Stores Co.* (1936), 272 N. Y. 304.

This Court reviewed and reversed arbitrary action of a quasi-judicial railroad rate regulatory body in *Oregon R. R. & N. Co.* v. *Fairchild* (1912), 224 U. S. 510, 524, 527, 528. The case came up on a writ of error, "in which it is contended that the (State of) Washington *statute* failed to furnish an adequate hearing or opportunity for judicial review * * *" and, further, complaining against the procedure in the tribunal itself (p. 517. Our emphasis). This procedure complained about must have been pursued by the tribunal under the challenged provisions of the statute itself.

In the case at bar, however, the appellant has heretofore not complained against the judicial process as unconstitutional.

This Court has had under consideration some aspects of declaratory judgments in:

Willing v. *Chicago Auditorium Assn.* (1928), 227 U. S. 274;
Piedmont and Oregon Ry. Co. v. *United States* (1930), 280 U. S. 469;
Aetna Life Insurance Co. v. *Haworth* (1937), 300 U. S. 327.

See, also, Borchard *Declaratory Judgments* (2nd Ed.), pp. 174-203; Anderson, *Actions for Declaratory Judgments*. We have nowhere found authority supporting appellant's claim to review here the practice in the State Courts as set forth in Points 1 and 3 of its law points.

POINT II

The complaint was fatally defective below because of the omission of any allegation that there now exists or is about to be constructed a single lodging house of the same classification as appellant's in favor of which the statute complained of discriminates against the appellant.

This Court has been exacting in requiring definite pleading of constitutional questions: *Pacific States Co.* v. *White* (1935), 296 U. S. 176, 185 and cases cited; *Wiley* v. *Sinkler* (1900), 179 U. S. 58, 66, where the complaint did not state the facts constituting a cause of action in alleging a violation of the constitution.

Appellant made the first pleading: it was there for it to state its case, viz., that it and others similarly situated had, not in theory, but *in fact*, been selected for discrimination. The gravamen of appellant's action, under the principal federal question argued below, is pleaded in paragraph 24, subdivision a, of his complaint as follows (R. 8-9):

> "(a). Said law deprives plaintiff and all persons similarly situated of an equal protection of the law since under said chapter 553, Laws of 1928* and under the Multiple Dwelling Law as the same now exists, any person may lawfully erect a building in the same locality as plaintiff's and in all respects similar to plaintiff's building and operate the same without any legal necessity for complying with chapter 553 of the Laws of 1944."**

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* *Sic.* No doubt meaning Laws of 1944, effective April 5, 1944.

** Formally denied in Appellant's answer, paragraph First, (R. 14).

Appellant further *argued* the hypothesis, that existing buildings might be altered into lodging houses, whereupon this statute would be inapplicable as to them, as well.

This complaint is fatally defective because of the omission of any allegation that there now exists or is about to be constructed a single lodging house, of the same classification as appellant's, in favor of which the statute complained of discriminates. May we suggest that assuredly while the case was pending at Special Term, and in the Appellate Division probably, there was ample provision under our local practice to amend the pleading, if appellant could truthfully and soundly make this allegation; and even at this late day, if there has fortuitously and suddenly come into existence any state of facts supporting such an allegation of discrimination, appellant is free to begin this entirely different cause of action untouched of *res judicata*. See Civil Practice Act, §§245, 245b, 111, 112, dealing with amendments of a Complaint.

POINT III

The claim of unequal protection of the laws is unjustified, because the legislature recognized that there had been no new lodging houses built since the war and is even now considering legislation for new construction of such buildings.

The statute against which the appellant complains is stop-gap, war-time legislation intended to meet an emergency.* There is no case we can find holding that a legis-

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* See ***Statement of the Case,*** pages 6-9 of this brief.

lature is constitutionally bound to anticipate conditions that do not exist, or all that can be imagined.

Of all these things relating to legislative committees, existent physical conditions, investigations, messages of the Governor and the course of legislation, the courts of New York, whose three decisions are brought under review here, could take judicial notice:

Tenement House Dept. v. *Moeschen* (1904), 179 N. Y. 325; Judgment affirmed without opinion, 203 U. S. 583;
Grimmer v. *Tenement House Dept.* (1912), 204 N. Y. 370;
Browne v. *City of New York* (1925), 241 N. Y. 96, 122;
Peo. ex rel. Cohen v. *Butler* (1st Dept., 1908), 125 App. Div. 384, 388.

If we may be permitted to invert a famous phrase—It is a theory, not a condition which confronts us. The record, of course, is scant, but that is also the appellant's misfortune. We submit that this beneficent emergency legislation protecting lodgers should not be obliterated or suspended, because imaginable, but non-existent cases, are not for the instant covered by the law.

In the New York Court of Appeals the rule is established that a judgment may be sustained, *but not reversed*, by supplying proof, even in the appellate courts, "which is a matter of record that cannot be answered or changed."

Stemmler v. *Mayor of New York, etc.* (1904), 179 N. Y. 473, 482 and cases cited;
People v. *Flack* (1915), 216 N. Y. 123, 129-130;
Bull v. *Burton* (1919), 227 N. Y. 101, 110.

The messages of the Governor, the Legislative bills, the journals of the Assembly and the Senate, the reports of the Legislative Committees, are all of record in public offices and "cannot be answered or changed". The validity of the judgments of the New York Courts should not fail, simply because appellant has not brought here a record containing facts and circumstances which the New York Courts did, or could now examine under the rules of judicial notice, or which the Court of Appeals or Appellate Division could have supplied by actual proof. (They did not feel the need of proof, however, but proceeded under rules of judicial notice or on the uncontroverted statements of counsel.)*

Moreover, in *Borden's Co.* v. *Baldwin* (1934), 293 U. S. 194, 205, this Court did apply the rules of judicial notice in principle, if not in fact, as freely as do the New York Courts, when this Court looked into the proceedings of a New York Legislative Committee and was aided in interpreting by "suggestions which the Attorney General of the State and the counsel for the Department of Agriculture and Markets, with their special experience, have been able to bring forward". Mr. Chief Justice HUGHES further said in that case at page 209:

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* We do not imply that there we ourselves brought to the attention of our courts the reports of the Mitchell Committee on Multiple Housing, or the current proposed legislation on lodging houses. We simply say these documents exist and tend to sustain the judgments below, if this court itself sees fit to notice them under its own rules. This Court has gone far under the suggestions of the late Mr. Justice BRANDEIS, when he was at the Bar, in accepting factual statements on the briefs of counsel, when constitutional questions were considered, *Muller* v. *Oregon* (1908), 208 U. S. 395; and our Court of Appeals has followed this Court's example in *People* v. *Charles Schweinler Press* (1915), 214 N. Y. 395, and in many other cases.

> "When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matter which may be judicially noticed, or to other legitimate proof that the action is arbitrary."

To like effect see the opinion of Mr. Chief Justice Stone in *Metropolitan Co.* v. *Brownell* (1935), 294 U. S. 580, 589, where he collects the cases.

After this statement of the principle of judicial notice in the *Borden's Company*, case, this Court, however, found it inexpedient, if not impossible, on demurrer, to examine the immensely complex, economic, commercial, and industrial conditions involved in the attack on the constitutionality of the New York Milk Control Legislation assailed there; and, therefore, remanded the case for a ventilation of the facts by the trier thereof.*

The present Chief Justice of the United States and Mr. Justice Cardozo, in concurring in the result of the decision in the first *Borden's Company* case, said in a memorandum, 293 U. S. at page 213:

> "We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that

* After trial before a Special Master, a "Triune" Court sitting in the Southern District of New York dismissed the bill upon the merits, *sub nom. Borden's Farm Products Co.* v. *Ten Eyck*, 11 F. Supp. 593 (1935). On appeal, the decree was affirmed here, four Justices dissenting, in 297 U. S. 251 (1936).

the production of evidence will make the answer to the questions clearer.

Since our brethren find that likelihood to be present in this case, and are content to postpone an adjudication of the merits, we refrain from any discussion of the validity of the statute on the basis of facts within the range of judicial notice, and assent to the judgment recommended in the opinion of the court."

The case at bar presents no such complexities; a trial can result only in a circumlocution of the uncontradicted. Here there are no such factual difficulties as the majority of the Court also found required a trial of the facts in *Gibbs* v. *Buck* (1939), 307 U. S. 66, or in *Polk Co.* v. *Glover* (1938), 305 U. S. 55, and *Chastleton Corp.* v. *Sinclair* (1924), 264 U. S. 543. We note, however, that this Court in remanding in all these cases, including the *Borden's Company* case, was exercising its jurisdiction within its own system of Federal Courts, and was not sending its mandate to State civil courts. We think appellant's counsel will not here and now challenge our statement that there do not exist any lodging houses built, or buildings altered into lodging houses, since the statute attacked took effect.

A litigant who really believes he has a triable issue of fact does not ordinarily subject himself to the risk of dismissal of his complaint in the exercise of discretion by seeking a declaratory judgment.* In real cases of adversary parties, he frames his complaint in one of the con-

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* RULES OF CIVIL PRACTICE—Rule 212. *Jurisdiction discretionary.* If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised."

ventional forms and awaits the issue of fact to arise on the answer. Usually he expects to prevail on his own papers when he seeks this extraordinary relief, as in *Wingate* v. *Flynn, Secretary of State* (1931), 139 N. Y. Misc. 779; aff'd without opinion 256 N. Y. 690; or agrees with his adversary on a submitted controversy, as in *People* v. *Tremaine* (1929), 252 N. Y. 27. Appellant's complaint about necessity for a trial here is an afterthought.

Another matter should also be considered. Even if there should arise the accident of an existing structure being altered into a lodging house or a new lodging house itself built while the proposed legislation affecting new lodging houses is pending for enactment, the City of New York through the "Department of Housing and Buildings and Fire Department had" [has] "ample powers to enforce adequate precautionary methods under §§300-309 of the Multiple Dwelling Law and §§487a-1.0, 487e-2.0 and 491a-2.0 of the Administrative Code". These quoted words are taken from the Reporter's notes of our contentions in attaining the decision below, reported in 294 N. Y. 917, at 918. The statute assailed here itself provides in its section 4, subd. 7:

> "Nothing contained herein shall be deemed to abrogate the powers or duties vested in the fire commissioner of the fire department of the city of New York under the provisions of chapter nineteen of the administrative code of the city of New York."

It is presumed always that public officers will do their duty and will not permit discrimination, *Lieberman* v. *Van DeCarr* (1905), 199 U. S. 552, 560. At all events, no harm can come to appellant until new lodging houses are built,

or the public officers do violate its rights and the pending legislation fails completely.

So the case at bar becomes like *U. S. v. Caroline Products Co.* (1938), 304 U. S. 144, where this Court took judicial notice of and looked into the reports of Congressional Committees. There the Federal statute involved did not, just as the State statute here does not, embrace all imaginable cases, but this Court overruled the demurrer and the constitutionality of the law assailed was upheld.

Appellant takes the doctrinaire position that the statute is unconstitutional on its face, because it applies only to the situation existing at the time of its enactment. The courts below were urged to dismiss this action upon the ground that there is no presently existent situation where discrimination can result. This impossibility of discrimination is the "state of facts" that "reasonably can be conceived" under the first *Borden's Company* case in 293 U. S. at 209. Since no opinions were published in any of the three courts below, we are justified in assuming that the burden of our argument was likewise borne by the courts below.

Appellant bears the burden of reversing. The judgments below are presumptively correct. The problem is not whether we have brought here enough to sustain the findings below; but whether appellant can fulfill the task of an affirmative in a questing constitutional case, and thus reverse. There were other methods of testing our law by judicial process it surely could have sought, rather than the highly discretionary declaratory judgment it found convenient to its needs. The remedy apparently was denied appellant as a matter of law under Rule 212 of the Rules of Civil Practice.

POINT IV

The claim of costliness is without merit.

Appellant pleaded in paragraph 24, subdivision b of its complaint (R. 9), deprivation of property amounting to confiscation, under the statute assailed. In paragraph 22 (R. 8) it pleads that its Clover Hotel "has a market value of approximately $25,000" and that "the cost of complying with any applicable parts of said violation is the sum of approximately $7,500 * * *". Again we refer, under the New York rule cited *supra*, to record facts "that cannot be answered or changed". The assessment books in the Real Estate Bureau of the Tax Department of the City of New York show that this property is assessed for the tax year 1943-44 (including April 1944, when the assailed statute took effect), under Block 521, Lot 75, at a total of $78,000, of which $34,000 was allotted to the land and $44,000 to the building. A $4,000 rehabilitation exemption was allowed on this $78,000 under Local Law No. 264. If the appellant so underestimates the property value, it is arguable, at least, he likewise overestimates the cost of compliance.

While these particular facts, disclosed in a public office of record, were not called to the attention of the New York Courts, they are facts, however, which the Appellate Division and Court of Appeals would have judicially noticed or accepted as proof. We submit that this Court has equal competence to accept this statement of fact; at least, until Appellant denies our accuracy or states the contrary. *Ex Parte State of New York, No. 2* (1920), 256 U. S. 503, 509-10, *supra*.

In the courts below we relied upon *Adamec* v. *Post, as Tenement House Commissioner of the City of New York*, (1937), 273 N. Y. 250, 258-260; 109 ALR. 1401. There, on the City's motion, the complaint was dismissed on the ground that it failed to state a cause of action. (Just as here, grounds of "demurrer" were resorted to.) In that case the property was assessed at a total of $13,500—$5,000 for the land and $8,500 for the building. The cost of alterations required under the Multiple Dwelling Law was alleged to be "upwards of $5,000".

Chief Judge LEHMAN said, at page 260, for a unanimous Court;

> "It does not appear and it is not claimed that the alterations are not reasonably calculated to attain this object and it can hardly be argued that the imposition of a cost of $5,000 to attain that result in a tenement house containing 40 rooms is unreasonable even though it may cause hardship in an individual case. Because the State has tolerated slum dwellings in the past it is not precluded from taking appropriate steps to end them in the future."

We can perceive no justiciable issue to be tried upon the opinion of appellant that compliance "would require a large expenditure of money with very little benefit and without any necessity therefor and any finding by any competent legislative body that any condition exists requiring the exercise of the police power of the State of New York" (R. 9). The legislation introduced this year by the Mitchell Committee, and the "flop-house" fire so eloquently described below by the appellant, lead to the conclusion that the legislation in its instant application is reasonable and is justified factually by sufficient legislative investigation.

CONCLUSION

The judgment appealed from should be affirmed.

New York, N. Y., March 23, 1946.

Respectfully submitted,

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APPENDIX A

CHAP. 553, LAWS OF 1944
Approved by Governor
April 5, 1944

AN ACT

TO AMEND THE MULTIPLE DWELLING LAW, IN RELATION TO FIRE PROTECTION IN EXISTING LODGING HOUSES

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision four of section four of chapter seven hundred thirteen of the laws of nineteen hundred twenty-nine, entitled "An act in relation to multiple dwellings, constituting chapter sixty-one-a of the consolidated laws," is hereby amended to read as follows:

4. (a) A "class A" multiple dwelling is a multiple dwelling which is occupied, as a rule, for residence purposes and not transiently. This class shall be deemed to include and shall include tenement houses, flat houses, maisonette apartments, apartment houses, apartment hotels, bachelor apartments, studio apartments, duplex apartments, kitchenette apartments, and all other multiple dwellings except class B multiple dwellings as defined in subdivision five of this section, whether or not such other multiple dwellings are specifically designated by name in this subdivision.

(b) An "apartment" is that portion of a multiple dwelling consisting of a group of rooms containing at least

one bathroom and arranged to be occupied by the members of a family, which group of rooms is separated and set apart from all other groups within a multiple dwelling.

(c) "Single room occupancy" shall be deemed to be an occupancy by one or two persons of a single room, or of two or more rooms which are joined together, separated from all other rooms within an apartment, in a multiple dwelling, so that the occupant or occupants thereof reside within an apartment separately and independently of the other occupant or occupants of the same apartment.

(d) A "single room occupancy building" is a class A multiple dwelling used or let for single room occupancy which conforms to section two hundred forty-eight of this chapter.

§ 2. Subdivision six of section four of such chapter is hereby amended to read as follows:

6. (a) A "hotel" is an inn having at least thirty sleeping rooms.

(b) A "rooming house" or a "furnished room house" is any class B multiple dwelling, other than a hotel, having less than thirty sleeping rooms and in which persons either individually or as families are housed or lodged for hire or otherwise, with or without meals.

§ 3. Subdivision seven of section four of such chapter, as last amended by chapter nine hundred thirty of the laws of nineteen hundred forty-one, is hereby amended to read as follows:

7. A "lodging house" is any class B multiple dwelling, other than a hotel, a rooming house or a furnished room house, in which persons are harbored, or received, or lodged,

for hire for a single night, or for less than a week at one time, or any part of which is let for any person to sleep in for any term less than a week.

§ 4. Section thirteen of such chapter is hereby amended to read as follows:

§ 13. Application to existing dwellings. 1. Any building heretofore erected and occupied at the time this chapter becomes effective, or thereafter, as a tenement house, which is not recorded as such in the department heretofore charged with the enforcement of the tenement house law, shall be required to comply with all of the provisions of this chapter governing the like class or kinds of dwelling hereafter erected. But except as otherwise expressly required in this section and in sections twenty-five and thirty-three of this chapter, nothing in this chapter shall be construed to require any change in the construction or use or occupancy of any fireproof multiple dwelling, or any non-fireproof hotel, or any lodging house, or any rooming house, other than a converted dwelling, heretofore erected, used and occupied as such under the provisions of all local ordinances, and regulations applicable thereto at the time this chapter becomes effective; but should the use or character of occupancy of any such dwelling be hereafter altered or converted, such dwelling shall be required to comply with the provisions of section eight of this chapter.

2. In the application of this section, a "dormitory" in a lodging house shall mean any place which is used for sleeping purposes; a "cubicle" shall mean a small, partially enclosed sleeping space within a dormitory, with or without a window to the outer air; and "department"

shall mean the department charged with the enforcement of this chapter.

3. Lodging houses of non-fireproof construction existing prior to the enactment of this subdivision shall comply with the following conditions:

(a) No wood or other combustible facing shall be permitted on the walls, partitions or ceilings of entrance halls, public halls or public stairs. Such wood or other combustile facing shall be removed from the walls, partitions and ceilings of entrance halls, public halls and public stairs.

(b) Except a flat base-board not exceeding ten inches in height, the stair string and hardwood handrails, all wood soffits, fascias, railings, balustrades and newel posts shall be completely removed and shall be replaced with metal or other hard incombustile material of such size and secured in such manner as may be approved by the department.

(c) Except interior windows or similar openings in a partition forming the enclosure of an entrance hall or public stair or public hall which are used in the operation and maintenance of such buildings and which are protected with automatic fire windows, every window in such entrance hall, public stair or public hall not opening to the outer air and every sash in the walls or partitions of such entrance hall, public stair or public hall shall be completely removed and the openings closed and fire retarded.

(d) In all dormitories, entrance halls, public halls, stair halls, public stairs, storage rooms, cellars and other parts of the building there shall be provided an automatic wet pipe sprinkler system installed and maintained in con-

formity with regulations adopted by the department. In connection with such sprinkler system there shall be an automatic closed-circuit alarm system so arranged and installed as to give warning, at a recognized central station satisfactory to the department, of the closure of any valve controlling water supply to any of the sprinklers and of the operation of any sprinkler head. Such alarm system shall also be so installed and maintained as to actuate an alarm bell at least eight inches in diameter in each dormitory in such building and in the office of the lodging house when a sprinkler operates. Such sprinkler and alarm systems shall have supervisory and maintenance service satisfactory to the department.

(e) All entrance halls, public halls, stair halls and public stairs which have not been fire retarded in accordance with rules and regulations of the department shall be fire retarded on the hall or stair side with half-inch plaster board covered with twenty-six gauge metal or equivalent as approved by the department.

(f) All doors opening upon entrance halls, public halls, stair halls or public stairs shall be self-closing, fireproof doors and such doors shall not be held open by any device whatever.

(g) The cellar ceiling and the ceiling of each story in a building which is used for lodging-house purposes shall be covered with fire-retarding material. The department may accept an existing ceiling if such ceiling is in good condition, provided, however, that such ceiling has been plastered, or covered with metal or with half-inch plaster board covered with metal, or the equivalent approved by the department.

(h) Except partitions forming the enclosures of existing cubicles, all wood partitions and all combustible covering on walls or partitions throughout the portion of the building used for lodging house purposes shall be removed or protected with incombustible material approved by the department.

(i) In all dormitories there shall be aisles providing proper access to all required means of egress and such aisles or other means of egress shall not be obstructed in any manner whatsoever. Main aisles, approved as such by the department to provide adequate approaches to the required means of egress, shall be not less than three feet in width.

(j) All required means of egress shall be indicated by signs reading "EXIT". The letters thereon shall be at least eight inches in height and shall be red on a background of white; and each exit sign shall be illuminated at all times during the day and night by a red light of not less than twenty-five watts or equivalent photometric rating. Such light shall be placed and maintained in a keyless socket. On all floors where doors, openings, passageways or aisles are not visible from all portions of such floors, continuously illuminated directional signs shall be installed and maintained in conspicuous locations, indicating the direction of travel to the required means of egress. At least one such sign shall be easily visible from the doorway of each cubicle.

(k) Access from the public hall at the top story to the roof shall be provided by means of a bulkhead or a scuttle acceptable to the department.

(m) There shall be at least two exits from each floor. Such exits shall be remote from each other. The first exit

shall be to the street or to an enclosed stair. If the floor is above the entrance floor, the second exit shall be to a regulation outside fire-escape or to an additional stair and such second exit shall be accessible without passing through the first exit.

(n) All openings on the course of a fire-escape shall be provided with automatic, self-closing, fireproof, wire glass window assemblies or self-closing, fireproof door assemblies acceptable to the department.

(o) There shall be one or more completely enclosed compartments remote from any stairway for the storage of mattresses, linens, brooms, mops and other paraphernalia incidental to the use, occupancy and maintenance of such building, and such paraphernalia shall be stored in no other portion of such lodging house. The partition forming each such compartment shall be of fire-resistive construction and shall be provided with a self-closing fireproof door, and each such compartment shall be ventilated in accordance with rules adopted by the department. Any space which is used for the storage of mattresses, in addition to conforming to the other provisions of this section, shall be provided with a window not less than ten square feet in area, and such window shall open on a street or yard.

(p) There shall be provided on each floor one or more containers of metal or other hard incombustible material, with self-closing lid, in which all scrap and refuse of a combustible nature shall be placed until finally disposed of.

(q) The portion of any ceiling over and the floor beneath any furnace, stove, boiler or hot-water heater shall be fire retarded, and such fire retarding shall extend for a distance of at least four feet beyond the sides and rear and

eight feet in front of such furnace, stove or hot-water heater. Metal breechings and flues connected to such devices shall be made secure and shall be protected in conformity with regulations adopted by the department.

(r) No insecticide containing inflammable or combustible materials shall be stored without a permit from the fire department, and no such inflammable or combustible insecticide shall be stored except in a completely enclosed room or compartment of fire-resistive construction. Such room or compartment shall be ventilated in accordance with regulations adopted by the department.

(s) The top of the enclosure of every cubicle shall be at least two feet from the ceiling.

(t) Existing cubicles complying with the provisions of this section may be maintained. Nothing herein contained shall be construed to prohibit a rearrangement of existing cubicles made necessary by the provisions of this section.

(u) All parts of every such lodging house shall be inspected by a clerk or watchman at least once in every two hours.

4. The number of persons accommodated on any story in a lodging house shall not be greater than the sum of the following components:

(a) Twenty-two persons for each full multiple of twenty-two inches in the smallest clear width of each means of egress approved by the department, other than a fire escape.

(b) Twenty persons for each regulation fire-escape accessible from such story if it is above the entrance story.

5. The department shall have power to adopt supplementary regulations relating to fire-escapes, protection from fire, and the installation of sprinkler systems and fire alarms in such lodging houses.

6. The department shall cause all lodging houses to be inspected at intervals of not more than three months.

7. Nothing contained herein shall be deemed to abrogate the powers or duties vested in the fire commissioner or the fire department of the city of New York under the provisions of chapter nineteen of the administrative code of the city of New York.

§ 5. This act shall take effect immediately.

SUPREME COURT OF THE UNITED STATES.

No. 769.—October Term, 1945.

Queenside Hills Realty Co., Inc., Appellant, *vs.* T. Newton Saxl, As Commissioner of Housing and Buildings of the City of New York. } Appeal from the Court of Appeals of the State of New York.

[April 22, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

In 1940 appellant constructed a four story building on the Bowery in New York City and since that time has operated it as a lodging house. It was constructed so as to comply with all the laws applicable to such lodging houses and in force at that time. New York amended its Multiple Dwelling Law[1] in 1944,[2] providing, *inter alia*, that lodging houses "of non-fireproof construction existing prior to the enactment of this subdivision"[3] should comply with certain new requirements.[4] Among these was the installation of an automatic wet pipe sprinkler system. Appellant received notice to comply with the new requirements and thereupon instituted this suit in the New York courts for a declaratory judgment holding these provisions of the 1944 law unconstitutional and restraining their enforcement.

The bill alleged that the building was safe for occupancy as a lodging house and did not constitute a fire hazard or a danger to the occupants; that it complied with all building laws and regulations at the time of its construction; that part of it was fireproof and that the rest was so constructed as not to be dangerous to occupants; that the regulations existing prior to 1944 were adequate and sufficient to prevent loss of life in lodging houses of this particular type. It was further alleged that this lodging

[1] L. 1929, ch. 713; Cons. L. ch. 61A.

[2] L. 1944, ch. 553.

[3] *Id.*, § 4.

[4] This followed a disastrous fire in an old lodging house in New York City in which there was a considerable loss of life.

house has a market value of about $25,000, that the cost of complying with the 1944 law would be about $7,500; and that the benefits to be obtained by the changes were negligible. By reason of those circumstances the 1944 law was alleged to violate the due process clause of the Fourteenth Amendment. It was also alleged to violate the equal protection clause of the Fourteenth Amendment since it was applicable to lodging houses "existing" prior to the 1944 law but not to identical structures erected thereafter. Appellee answered, denying the material allegations of the bill, and moved to dismiss. The Supreme Court granted the motion. The Appellate Division affirmed without opinion. 269 App. Div. 691. On appeal to the Court of Appeals the judgment was likewise affirmed without opinion. 294 N. Y. 917. The case is here on appeal, the Court of Appeals having certified by its remittitur that questions involving the Fourteenth Amendment were presented and necessarily passed upon. 295 N. Y. 567.

Little need be said on the due process question. We are not concerned with the wisdom of this legislation or the need for it. *Olsen* v. *Nebraska*, 313 U. S. 236, 246. Protection of the safety of persons is one of the traditional uses of the police power of the States. Experts may differ as to the most appropriate way of dealing with fire hazards in lodging houses. Appellant, indeed, says that its building, far from being a fire-trap, is largely fireproof; and to the extent that any fire hazards exist, they are adequately safeguarded by a fire alarm system, constant watchman service, and other safety arrangements. But the legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum. Many types of social legislation diminish the value of the property which is regulated. The extreme cases are those where in the interest of the public safety or welfare the owner is prohibited from using his property. *Reinman* v. *Little Rock*, 237 U. S. 171; *Hadacheck* v. *Los Angeles*, 239 U. S. 394; *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498. We are dealing here with a less drastic measure. But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws. *Hada-*

check v. *Los Angeles, supra*, p. 410. And see *Chicago, B. & Q. R. Co.* v. *Nebraska*, 170 U. S. 57; *Hutchinson* v. *Valdosta*, 227 U. S. 303. The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights. *Block* v. *Hirsh*, 256 U. S. 135, 155. And see *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531. Appellant may have a lodging house far less hazardous than the other existing structures regulated by the 1944 law. Yet a statute may be sustained though some of the objects affected by it may be wholly innocent. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204. The question of validity turns on the power of the legislature to deal with the prescribed class. That power plainly exists here.

Appellant's claim of lack of equal protection is based on the following argument: The 1944 law applies only to existing lodging houses; if a new lodging house were erected or if an existing building were converted into a lodging house, the 1944 law would be inapplicable. An exact duplicate of appellant's building, if constructed today, would not be under the 1944 law and hence could be lawfully operated without the installation of a wet pipe sprinkler system. That is said to be a denial of equal protection of the laws.

The difficulty is that appellant has not shown that there are in existence lodging houses of that category which will escape the law. The argument is based on an anticipation that there may come into existence a like or identical class of lodging houses which will be treated less harshly. But so long as that class is not in existence, no showing of lack of equal protection can possibly be made. For under those circumstances the burden which is on one who challenges the constitutionality of a law could not be satisfied. *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580, 584. The legislature is entitled to hit the evil that exists. *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Bryant* v. *Zimmerman*, 278 U. S. 63; *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499. It need not take account of new and hypothetical inequalities that may come into existence as time passes or as conditions change. So far as we know, the 1944 law may have been designed as a stop-gap measure to take care of a pressing need until more comprehensive legislation could be prepared. It is common knowledge that due to war conditions there has been little construction in this field in recent years. By the time new

lodging houses appear they, too, may be placed under the 1944 law; or different legislation may be adopted to take care both of the old and the new on the basis of parity. Or stricter standards for new lodging houses may be adopted. In any such case the asserted discrimination would have turned out to be fanciful, not real. The point is that lack of equal protection is found in the actual existence of an invidious discrimination (*Truax* v. *Raich*, 239 U. S. 33; *Skinner* v. *Oklahoma*, 316 U. S. 535), not in the mere possibility that there will be like or similar cases which will be treated more leniently.

Affirmed.

Mr. Justice RUTLEDGE concurs in the result.

Mr. Justice JACKSON took no part in the consideration or decision of this case.